

N.D.A.G. Letter to Bonner (June 14, 1988)

June 14, 1988

Ms. Margy Bonner
City Attorney
P.O. Box 1306
Williston, ND 58802-1306

Dear Ms. Bonner:

Thank you for your letter of June 3, 1988. Your letter discusses recent action taken by the Williston City Commissioners with respect to a city official. The final result of that commission action is that the individual who had acted as city administrator/city auditor no longer continued in that joint position.

N.D.C.C. § 40-15-07 states that any person appointed to any office in a commission city form of government as well as any employee of such a city may be removed by a majority vote of all members of the board of city commissioners. However, the statute prohibits removal except for cause and unless charges are preferred against the person and the person is accorded an opportunity to be heard in his own defense. The question is whether the provisions of N.D.C.C. § 40-15-07 apply to the individual in question.

The purpose of opinions of the Attorney General is to resolve questions of law involving state statutes, the state constitution, or matters of statewide concern. This office does not issue opinions on questions of fact as we are unable to act as a fact finding body and are not authorized to resolve disputes by applying facts and circumstances to the applicable laws. Obviously, this is a task of the judicial branch of government or administrative agencies acting in their quasi-judicial capacities.

There appears to be no legal dispute in the controversy described in your letter. Clearly the provisions of N.D.C.C. § 40-15-07 apply to two categories of city personnel. If the person is appointed to an office of a city operating under the commission form of government or is an employee of such a city, removal process may be had but certain procedures must be followed.

In the situation described in your letter, however, there is some controversy as to whether the individual involved, because he apparently held a joint position one of which was an appointed position, falls within the provisions of N.D.C.C. § 40-15-07. This resolution involves questions of fact which I cannot pass upon in the form of an Attorney General's opinion and must defer judgment to you as counsel for the city acting as the official legal advisor of the city and in advising the city commission.

Nonetheless, certain additional facts have come to my attention concerning this matter. As an attempt to be a resource to you and to the members of the city commission, I do

want to make some observations concerning this matter.

I am told that the individual involved was employed as a city employee for 11 or 12 years. This employee acted in the capacity as the city administrator for the city of Williston. After having acted in this capacity for some time, the person also received an appointment as city auditor. The most recent appointment as city auditor was allowed to expire with no further action taken on the appointment.

Thus, the facts that I have indicate that at the time the city auditor appointment for this individual expired, the board also took action to determinate the person's employment as the city administrator. It is not the nonrenewal of the auditor appointment which is at issue. The appointment was simply allowed to expire by its own terms and a removal of the auditor did not occur. Instead, it is the latter action (termination of employee as city administrator) which gives rise to this controversy.

The facts I have just described, as they have been relayed to this office, strongly suggest the person involved was an employee of the city despite the fact that the person also held an appointment as an city official which appointment was allowed to expire without renewal. Based on these very specific facts and circumstances, it is my informal observation that the person in question should be considered as an employee of the city and entitled to the removal procedures outlined in N.D.C.C. § 40-15-07. Where there is some reasonable doubt as to the applicability of N.D.C.C. § 40-15-07, I believe any city commission would be well advised to consider the individual involved as an employee so as to prevent the rise in the future of potential legal issues as to the manner in which the employee was removed.

Again, my observation is based upon the facts presented to this office are informal and cannot be considered as an opinion of this office as they do not involve questions of law. However, I do hope that my information is helpful to you and to the members of the city of the city commission in resolving this matter.

Sincerely,

Nicholas J. Spaeth

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